No. [illegible]

IN THE

Supreme Court of the United States

[illegible]

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

NORTHWEST AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR NORTHWEST AIRLINES, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly concluded on the basis of the peculiar facts of this case that it was improper to enforce an arbitration award under the Railway Labor Act, § 3 First (p) and (q), because the award was based entirely upon a supposed concession which, all parties agree, was never made, and was not based on the arbitrator's own interpretation of the contract or findings of fact.

STATEMENT

This case grows out of a labor contract dispute between respondent Northwest Airlines, Inc. ("Northwest"), an air carrier, and petitioner Air Line Pilots Association ("ALPA"), the collective bargaining representative of Northwest's pilots. The dispute involves the permissibility of Northwest's use of some furloughed pilots to serve as instructor pilots during a 1970 strike by other Northwest employees, represented by a different union, without selecting the instructors according to seniority.

The strike by non-pilot employees forced curtailment of Northwest's flight operations, and pilots were laid off or "furloughed" in reverse order of seniority. Senior pilots remaining on active status were sometimes asked to operate aircraft or assume duties to which they had not been customarily assigned, and Northwest used instructor pilots to familiarize those pilots with new assignments. Northwest chose the instructor pilots from the Pilots' System Seniority List, which carried the names of all Northwest pilots, including those temporarily "furloughed" during the strike or furloughed for other reasons, but did not select the instructors on the basis of their seniority ranking on that list.

Utilizing the procedure established by collective bargaining agreement, ALPA filed a grievance contending that Northwest was obliged to select as instructors only those pilots who had remained on active service during the strike. Northwest's position was that its only obligation was to draw instructor pilots – a distinct craft – from the system seniority list but did not have to reassign active pilots or proceed in accordance with seniority rankings.

Pursuant to an arbitration agreement made by the parties in conformity with § 204 of the Railway Labor Act, 45 U.S.C. § 184, the dispute was then submitted to a five-member adjustment board composed of two Northwest representatives, two ALPA representatives, and a "neutral" member serving as Chairman. In accordance with the agreement establishing its jurisdiction and prescribing its procedures, the adjustment board held a hearing at which both parties presented evidence.

After two executive sessions were held about a year after the hearing, the Chairman, with the concurrence of the two ALPA representatives, filed an opinion stating that Northwest should have selected the instructors from pilots in active service. The ALPA members concurred in that award. In his opinion, however, the Chairman stated that while the collective bargaining agreement was "insufficient" to support the union's position, the grievance was sustainable on the basis of a 1969 letter from Northwest to ALPA representing that Northwest would follow past practice by choosing as instructors qualified pilots whose names appeared on the "pilot seniority list." Despite the fact that the only seniority list introduced at the hearing was the Pilots' System Seniority List containing the names of all pilots, including those "furloughed" (*see* Pet. 23a n. 6), the Chairman's opinion went on to state that:

> "It is *agreed* that the reference to 'pilot seniority list' in the letter does not include furloughed pilots, but is limited to those pilots on the active roster." (Emphasis added.) (Opinion of the Board, quoted at Pet. 23a.)

As the court of appeals noted, this "agreement" to which the Chairman referred "was allegedly arrived at

between the company and union representatives during the board's first executive session." As the court of appeals also noted, and as ALPA's counsel formally stipulated in the district court, no such agreement in the course of the arbitration proceedings had ever been made. (Pet. 23a.)

The Northwest representatives on the board promptly but unsuccessfully sought to correct the Chairman's crucial misapprehension.[1] Because the Chairman expressly stated that his only basis for sustaining the grievance was the supposed "agreement" on the meaning of the 1969 letter, and because it was undeniable that the exclusive premise for the award was illusory, Northwest brought suit in the district court to set aside the award. ALPA counterclaimed for enforcement.

Ruling upon cross-motions for summary judgment, the district court entered an order enforcing the award. Citing the "policy of encouraging arbitral resolution of labor disputes" (Pet. 10a) the district court concluded that it was powerless to vacate the award, even though it found that the Chairman's decision was based "on an

[1] When the Chairman's opinion and award supporting the union on the basis of the non-existent "agreement" was first circulated to other board members, the Northwest representatives notified the Chairman by letter that no such "agreement" appeared of record. (A. 40.) The Chairman responded that the Northwest representatives had made a concession to this effect during the first executive session. (A. 46-47.) The Northwest representatives then submitted affidavits confirming that there had been no such concession. (A. 41-45, 133-34.)

The ALPA representatives subsequently acknowledged that there had been no concession by Northwest on this matter during the executive sessions. (Pet. 23a n. 6.) Nevertheless, they signed the Chairman's proposed award and the opinion without bringing the error to his attention, even though the error had been called to ALPA's attention as well (A. 48-49).

erroneous finding of fact", and a "substantial factual error." (Pet. 10a, 13a)

The court of appeals reversed, holding that under the exceptional circumstances presented here, where the arbitration tribunal had disposed of the question before it by invoking a non-existent concession allegedly made in the course of proceedings, rather than resolving the dispute by independently interpreting the collective bargaining agreement and finding the facts, the award should be vacated.[2] The court ordered the case remanded to permit the arbitration board to address the dispute on the merits.

ARGUMENT

In holding that the award in this case should not be enforced, the court of appeals remained well within the compass prescribed for review of adjustment board awards. The court recognized and articulated the pertinent, settled principles of law and reached the conclusion that the award here had to be set aside because of the peculiar, uncontested facts. Indeed, as we shall show, the court did not even exercise its full power to vacate improper awards.

[2] Northwest also argued in the court of appeals that the decision based on material entirely outside the record made at the hearing constituted a denial of due process, that such a decision was outside the jurisdiction conferred on the board by the arbitration agreement, and that the failure of the ALPA representatives on the Board to inform the Chairman of his error in postulating a non-existent stipulation constituted fraud compelling vacation of the award. Because of its disposition of the case, the court below did not reach these issues.

1. Despite petitioner's assertions before this Court, the court of appeals has not invited "massive judicial involvement" in arbitration proceedings. Its decision did not entail any judicial "probing" of the arbitrator's "thought processes," or any evaluation of "what weight he gave the evidence before him, and what testimony he credited," as petitioner alleges. (Pet. 8, 10.) The Chairman's own statements on the face of the award itself showed that he found ALPA's arguments "insufficient" to support the grievance and instead rested *exclusively* on an alleged "agreement" between the parties as to the meaning of the term "pilot seniority list" in a letter commitment. As ALPA expressly acknowledged before the district court, such a concession had never taken place. The district court sustained the award only by ignoring that its sole basis was a single, glaring error – the supposed "agreement" which, both parties acknowledged, had never occurred and which was without foundation in the record. Once the court of appeals recognized the patent defect which all parties acknowledged and the district court itself specifically found, the award collapsed of its own weight.

This result does not depend on any reweighing of evidence or second-guessing of the arbitrator's thought processes. It is simply a recognition of the fact that the arbitrator, through an incontrovertible mistake, failed to discharge his duty to decide questions of interpretation and evidence because he erroneously believed they had been withdrawn by "agreement." For this reason the court below emphasized the absence of any possibility that refusal to enforce the award would encroach upon the arbitrator's power to "bring his informed judgment to bear" on interpretation of a collective bargaining agreement, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960): the arbitration

tribunal here simply had not performed that independent function. The unusual circumstances compelling vacation of the award are unlikely to recur, and the uniqueness of the case furnishes a "sound reason to deny review." *Dunn v. INS*, 419 U.S. 919, 924 (1974) (Stewart, J., dissenting from denial of certiorari).

2. In any event, the decision below vacating the award is entirely in accord with general legal principles. While the circumstances under which courts set aside arbitration awards are assuredly exceptional, the standards of review mandated by Congress, interpreted by this Court, and regularly applied by lower federal courts, not only permit judicial vacation of an award such as that presented here, indeed they compel it.

Sections 3 First (p) and (q) of the Railway Labor Act, 45 U.S.C. § 153 First (p), (q), which set forth the general standards of judicial review deemed applicable in air carrier arbitration cases,[3] provide that a reviewing court may set aside an award:

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[3] Sections 3 First (p) and (q) of the Railway Labor Act expressly govern judicial review of awards made by divisions of the National Railroad Adjustment Board. Awards made by "system, group, or regional boards of adjustment" established by railroads and unions under Section 3 Second, 45 U.S.C. § 153 Second, are subject to review under the same standards. Section 204 of the Act, 45 U.S.C. § 184, directs air carriers and their collective bargaining representatives to establish boards of adjustment "not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards" established under Section 3. Ordinarily, the "finality to be accorded" awards of boards created by Section 204 agreements is determined by the standards of Section 3 of the Act. *See International Ass'n. of Machinists v. Central Airlines*, 372 U.S. 682, 694 (1963) and cases cited therein.

> "for failure of [the arbitration board] to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the [board's] jurisdiction, or for fraud or corruption by a member of the [board] making the order."

This formulation was added in 1966, just after this Court had recognized in *Gunther v. San Diego & A.E.Ry.*, 382 U.S. 257, 261 (1965), that "wholly baseless" arbitration awards should be set aside. In doing so, the congressional committees explained that the grounds listed were intended to incorporate those bases traditionally available to vacate an arbitration award, and the committee reports expressly affirmed the duty of reviewing courts to refuse enforcement of an award "actually and indisputably without foundation in reason or fact."[4]

As explained in *Brotherhood of Railway Trainmen v. Central of Georgia Ry.*, 415 F.2d 403, 411-412 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970), "an award 'without foundation in reason or fact' is equated with an award that exceeds the authority or jurisdiction of the arbitrating body." *Accord, Brotherhood of Railroad Signalers v. Chicago, M., St. P. & P. R.R.*, 444 F.2d 1270, 1273-1274 (7th Cir. 1971) (Stevens, J.); *Laday v. Chicago, M. St. P. & P. R.R.*, 422 F.2d 1168 (7th Cir. 1970); *Diamond v. Terminal Railway*, 421 F.2d 228 (5th Cir. 1970).

These holdings are in harmony with the position traditionally taken by courts reviewing arbitration awards in other industries. Deference to the arbitrator requires judicial restraint, not abdication; courts have

[4] S. Rep. No. 1201, 89th Cong. 2d Sess. 3 (1966). *See also* H. Rep. No. 1114, 89th Cong. 1st Sess. 16 (1965).

routinely held that an award which is wholly "capricious," has "no support whatever" or is defective under an equivalent formulation of the governing standard cannot be enforced.[5]

None of the cases cited by petitioner at Pet. 13 rejects the principle expressed in the cases discussed and followed by the court below. Petitioner's cited cases stand only for the proposition that a court "cannot substitute its judgment for that of the arbitrator" (Pet. 12-13), but the same courts readily acknowledge that this salutary principle of restraint does not compel a court to rubber-stamp an award, even in the face of patent defects. *E.g., Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Co.*, 442 F.2d 1234 (D.C. Cir. 1971); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1126-1127 (3d Cir. 1969).

[5] *E.g., NF&M Corp. v. United Steelworkers, Local 8148*, 524 F.2d 756, 760 (3d Cir. 1975) (award must be vacated if "record before the arbitrator reveals no support whatever for his determinations"); *Electronics Corp. v. International Union of Electrical Workers, Local 272*, 492 F.2d 1255, 1257 (1st Cir. 1974) (enforcement denied where "*the* 'fact' underlying an arbitrator's decision is concededly a non-fact" [emphasis in original]); *Timken Co. v. Local 1123, United Steelworkers*, 482 F.2d 1012, 1015 (6th Cir. 1973) (enforcement denied when is award is "without support in the record" and "cannot be rationally deduced from the agreement"); *Torrington Co. v. Metal Produce Workers, Local 1645*, 362 F.2d 677, 680-681 (2d Cir. 1966) (award vacated was beyond arbitrator's authority in view of "uncontroverted fact"); *International Ass'n. of Machinists, Local 2003 v. Hayes Corp.*, 296 F.2d 238, 243 (5th Cir. 1961) (enforcement will be denied where award is "arbitrary, capricious or not adequately grounded in the collective bargaining contract"); *Textile Workers, Local 1386 v. American Thread Co.*, 291 F.2d 894, 899 (4th Cir. 1961) ("decisions which do such violence to the clear, plain, exact, and unambiguous terms of the submission" must be set aside).

With arbitration awards, as with decisions of other administrative tribunals, the "finality" that precludes judicial redetermination of the merits, *Enterprise Wheel, supra,* 363 U.S. at 596, has always been considered compatible with the availability of *some* meaningful judicial review. Such review has been regarded as imperative to insure that the discretion entrusted to the primary decision-maker remains within lawful bounds. *Compare Dunlop v. Bachowski,* 421 U.S. 560 (1975); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971); *Leedom v. Kyne,* 358 U.S. 184 (1958).

The propriety of judicial review for fundamental errors is especially compelling in airline system board arbitrations. In these cases, unlike the usual case, the obligation to arbitrate *does* arise "solely from operation of law," and is not the product of voluntary bargaining. *Compare Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 374 (1974). The assent to an agreement establishing the arbitration board here was compelled by Section 204 of the Railway Labor Act, 45 U.S.C. § 184. As this Court has recognized, an adjustment board created pursuant to Section 204 serves as "a public agency, not as a private go-between." *International Ass'n. of Machinists v. Central Airlines,* 372 U.S. 682, 695 (1963), *quoting Bower v. Eastern Airlines,* 214 F.2d 623, 626 (3d Cir. 1954); *Washington Terminal Co. v. Boswell,* 124 F.2d 235, 244 (D.C. Cir. 1941). Just as in other contexts where this Court has recognized that Congress did not intend to deny judicial redress to a party aggrieved by the clearly unlawful action of a public agency, *see Commissioner v. Shapiro,* ____ U.S. ____ (No. 74-744, March 8, 1976); *Dunlop v. Bachowski, supra; Leedom v. Kyne, supra,* the Congressional mandate here for judicial interdiction of

"wholly baseless" awards or those "indisputably without foundation" must be given full effect. Unusual but undisputed facts established that enforcement of the award in this case was precluded under those standards.

3. The court of appeals did not rest on that analysis, but emphasized an additional, peculiar feature of the case: the arbitral function had never been performed. The Chairman, who spoke for the adjustment board, did not interpret the collective bargaining agreement in light of the evidence of custom and practice presented to him at the hearing. Nor did he apply "his knowledge of the common law of the shop" or his judgment of "the effect upon productivity" of the particular result reached. *Compare United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960). In short, the Chairman made none of the judgments that are peculiarly those of the arbitrator, but instead disposed of the case on the basis of the non-existent "agreement" allegedly made by the Northwest representatives during arbitration proceedings. The Chairman treated that phantom "agreement" as having withdrawn from the dispute the issues of interpretation and prior practice. (Pet. 24a.)[6]

ALPA's belated acknowledgement that no such "agreement" had ever occurred removed the only prop supporting the award. Under these circumstances the

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[6]That this was the sole basis for the award was readily apparent from the face of the award and from the Chairman's letter to the Northwest representatives on the board. Both courts below, moreover, found as a fact that the award was "based" on a clear mistake of fact. The court below thus did not construe adversely a "mere ambiguity" in the opinion accompanying the award, as disapproved in *Enterprise Wheel, supra,* 363 U.S. at 598.

court below properly concluded that the award should be vacated, just as a court would necessarily set aside an award indicating on its face that the arbitrator had exceeded his jurisdiction. (Pet. 25a.)[7]

The court of appeals correctly concluded that the policy favoring arbitral resolution of labor disputes would be disserved by the enforcement of the instant award. The court did not "overrule" the arbitrator here, *compare Enterprise Wheel, supra,* 363 U.S. at 599, for the court did not even purport to interpret the contract. It simply acknowledged that the non-existent "agreement" was an improper basis for the award, and remanded the case so that an arbitration board could *make* a dispositive interpretation of the contract. It is only because of the court's decision that an arbitrator will now render an interpretation, as contemplated in *Enterprise Wheel* and intended by the parties when they established the board of adjustment. This result hardly involves impermissible judicial intrusion into the arbitration process, as alleged by petitioner.

[7] Confusingly labelling the pattern of facts presented here as a " 'reverse-*Enterprise*' situation" (Pet. 9), petitioner contends that a reviewing court should indulge every ambiguity in favor of enforcement of an award. (Pet. 11.) But here the face of the award and the concession of petitioner that the "stipulation" on which it was based had never occurred removed any doubt that the award was without foundation. The circumstances thus furnished the "positive assurance" petitioner demands. (Pet. 11.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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